

## Message Text

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TO USMISSION USBERLIN IMMEDIATE

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C O N F I D E N T I A L SECTION 01 OF 03 BONN 14934

E.O. 11652: GDS

TAGS: PGOV, PFOR, WB, GW, FR, UK, US

SUBJECT: TAKEOVER IN BERLIN OF ANTI-TERRORISM LAW

REFS: (A) BONN 14545; (B) USBERLIN 1737

SUMMARY: FOLLOWING FURTHER TRIPARTITE CONSIDERATION OF IMPLICATIONS OF TAKEOVER IN BERLIN OF FRG ANTI-TERRORISM LAW, ALLIED REPS AT BONN GROUP MEETING SEPT 7 WILL INFORM FRG REPS THAT APPLICATION OF ARTICLE 3 OF LAW TO BERLIN IS PROBLEMATIC. ALLIED REPS SHARE THE VIEW THAT, BECAUSE THIS ARTICLE WOULD EXPRESSLY CONFER ON THE FEDERAL PROSECUTOR PRIMARY JURISDICTION FOR PROSECUTION OF THE NEWLY DEFINED CRIME OF CREATING A TERRORIST CONSPIRACY, ITS TAKEOVER IN BERLIN WOULD AMOUNT TO AN EXTENSION OF THE COMPETENCE WHICH HE HAD FOR HANDLING CASES IN BERLIN AT THE TIME THE QA WAS CONCLUDED. DESPITE DISCLAIMERS THAT COULD BE PROVIDED IN BK/O AND BK/L, ALLIED REPS BELIEVE APPLICATION OF ARTICLE 3 IN BERLIN WOULD

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LEAVE THREE POWERS WITH UNCONVINCING ARGUMENT, IN

FACE OF ALMOST CERTAIN SOVIET PROTEST, THAT THE EXISTING SITUATION AND STATUS OF BERLIN HAVE NOT BEEN AFFECTED. AT THE SAME TIME, OUR UNDERSTANDING OF THE LAW IS THAT FAILURE TO APPROVE TAKEOVER OF SECTION 3 WOULD NOT ACTUALLY IMPEDE PROSECUTIONS FOR TERRORIST OFFENSES, AS THE FEDERAL PROSECUTOR WOULD STILL HAVE THE RIGHT TO INTERVENE, BUT UNDER LAW IN FORCE BEFORE THE QA. END SUMMARY

1. AT TRIPARTITE MEETINGS SEPT 3 AND 6, PROBLEM CREATED BY ARTICLE 3 OF FRG ANTI-TERRORISM LAW WAS AGAIN DISCUSSED. ARTICLE 3 IF APPLIED IN BERLIN WOULD PROVIDE THAT THE NEWLY DEFINED CRIME OF CREATING A TERRORIST CONSPIRACY WOULD BE ONE FOR ORIGINAL COMPETENCE OF KAMMERGERICHT AND THUS, UNDER CURRENT PROVISION OF COURT PROCEDURAL LAW (GVG), FEDERAL PROSECUTOR WOULD HAVE PRIMARY PROSECUTORIAL RESPONSIBILITY FOR THAT OFFENSE. WHILE ADDING ONLY THE NEW OFFENSE TO THE SEVEN OFFENSES FOR WHICH FEDERAL PROSECUTOR ALREADY HAS HAD SUCH COMPETENCE SINCE 1969, FORMAL EXTENSION OF COMPETENCE OF FEDERAL PROSECUTOR THROUGH THIS STEP CANNOT BE DENIED. GENERAL VIEW EVOLVED THAT WHILE "EXISTING SITUATION", AS TERM IS USED IN QA, IS NOT STATIC, MOVEMENT IN AREAS OF POWERS OF FEDERAL PROSECUTOR AND FEDERAL COURTS RE BERLIN WOULD REPRESENT EXPANSION OF FRG BERLIN TIES IN ONE OF TOUCHIEST AREAS OF QA WHERE THREE POWERS ARE ON WEAK GROUND.

2. DISCUSSION OF SITUATION IF ARTICLE 3 NOT APPLIED IN BERLIN RESULTED IN UNDERSTANDING THAT THE FEDERAL PROSECUTOR WOULD NOT ACTUALLY BE PRECLUDED FROM INTERVENING IN TERRORIST CONSPIRACY PROSECUTIONS IN BERLIN. HE WOULD DO SO, HOWEVER, ON THE BASIS OF EXISTING LAW, AND NOT THROUGH AN EXPRESS EXPANSION OF HIS COMPETENCE--AN OPTICAL DIFFERENCE OF CONSIDERABLE SIGNIFICANCE.

3. REASONING FOR THIS CONCLUSION--WHICH ALLIES MEAN TO EXPLORE WITH FRG REPS AT SEPT 7 BONN GROUP  
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MEETING--IS AS FOLLOWS: IF ARTICLE 3 DID NOT APPLY IN BERLIN, PROSECUTIONS FOR TERRORIST CONSPIRACIES AS DEFINED IN SECTION 129A OF THE CRIMINAL CODE (ARTICLE 1 OF THE NEW ANTI-TERRORISM LAW) WOULD IN THE FIRST INSTANCE BE BROUGHT IN LOWER COURTS IN BERLIN. HOWEVER, UNDER SECTION 120(2) OF GVG, THE FEDERAL PROSECUTOR CAN ASSERT PRIMARY COMPETENCE FOR CRIMES LISTED IN SECTION 74A(1) OF GVG IF A CASE IS OF

"SPECIAL IMPORTANCE." LISTED OFFENSES IN SECTION 74A(1)  
INCLUDE "ACTION CONTRARY TO A PROHIBITION OF ASSEMBLY  
(CONSPIRACY) IN CASE OF SECTION 129 OF CRIMINAL CODE".  
IF SECTION 129 HAS BEEN AMENDED OR REDEFINED BY  
ADDITION OF 129A THROUGH TAKEOVER OF ANTI-TERRORIST

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LAW, IT APPEARS POSSIBLE THAT FEDERAL PROSECUTOR  
COULD ASSERT PRIMARY COMPETENCE IN CASES OF TERRORIST  
CONSPIRACY OF SPECIAL IMPORTANCE, THROUGH PROCEDURE  
ALREADY AVAILABLE WITH RESPECT TO OFFENSES LISTED IN  
SECTION 74A(1) OF GVG INCLUDING SECTION 129 OF  
CRIMINAL CODE.

4. ALLIED REPS REALIZE THAT NON-APPLICATION OF  
ARTICLE 3 WILL PRECLUDE FEDERAL PROSECUTOR FROM TAKING  
OVER PROSECUTION IN BERLIN OF NEW TERRORIST CONSPIRACY  
OFFENSE BY PROCEDURE ENVISAGED IN ANTI-TERRORIST LAW.

IN THIS SENSE, NON-APPLICATION WOULD PRECLUDE "LEGAL UNITY" OF BERLIN WITH FRG; HOWEVER, ABSENCE OF SUCH UNITY WOULD BE TRUE ONLY WITH RESPECT TO PROCEDURES AND NOT WITH RESPECT TO SUBSTANTIVE LAW, THE NEWLY DEFINED OFFENSE BECOMING AN OFFENSE IN BERLIN THROUGH APPLICATION OF SECTION 1 OF ANTI-TERRORIST LAW.

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5. ALLIES ARE PRIMARILY CONCERNED BY FUTURE IMPLICATIONS OF EXPANSION OF FEDERAL PROSECUTOR'S PRIMARY COMPETENCE IN BERLIN, DESPITE FACT THAT THE LAW IN QUESTION APPEARS TO BE RELATIVELY SMALL STEP. IT COULD CAUSE FRG TO WONDER WHY, DESPITE ALLIED CONCERN AT FEDERAL PROSECUTOR'S TAKEOVER OF PROSECUTION IN BERLIN OF LORENZ KIDNAPPERS

AND FINAL AGREEMENT THAT BERLIN OFFICE OF FEDERAL PROSECUTOR AND NOT BUBACK WOULD HANDLE CASE, ALLIES A FEW WEEKS LATER ARE PREPARED FORMALLY AND EXPRESSLY TO EXPAND FEDERAL PROSECUTOR'S PRIMARY COMPETENCE IN BERLIN TO A NEW OFFENSE. IT MAY BE SEEN TO PROVIDE FOR POSSIBILITY OF FURTHER EXPANSION OF HIS COMPETENCE RE BERLIN IN FUTURE.

NOT ONLY WOULD AN OPPORTUNITY TO PUT DOWN A MARKER ON EXPANSION OF FEDERAL COMPETENCE IN THIS SENSITIVE AREA HAVE BEEN LOST, BUT A CONTRARY SIGNAL WOULD APPEAR TO HAVE BEEN GIVEN. THE SOVIETS WOULD READ ALLIED ACTION SIMILARLY IF APPLICATION OF ARTICLE 3 WERE PERMITTED BY THE THREE POWERS.

6. ALL AGREED AT TRIPARTITE MEETING SEPT 6 THAT AT BONN GROUP MEETING SEPT 7 ALLIED REPS WOULD INDICATE THAT THEY HAVE SERIOUS PROBLEMS WITH ARTICLE 3 AND THAT IN PERMITTING MOST OF LAW TO BE TAKEN OVER IN BERLIN, SOME SORT OF BK/O AND/OR BK/L WILL BE ISSUED, POSSIBLY PROVIDING THAT ARTICLE 3 CANNOT BE APPLIED IN BERLIN. FRG REPS WILL PRESUMABLY ADVOCATE THAT ARTICLE 3 BE APPLIED IN BERLIN FOR SAKE OF LEGAL UNITY AND UNIFORM COOPERATION BY THE FRG AUTHORITIES AND AUTHORITIES IN BERLIN TO COMBAT TERRORIST CONSPIRACIES WHICH POSE PARTICULAR THREAT TO BERLIN. IF IT APPEARS FROM FRG REACTION THAT ISSUE IS NOT LIKELY TO BE RESOLVED BY ALLIED AGREEMENT ON ISSUANCE OF BK/O AND/OR BK/L BY SEPT 20, WE HOPE TO GET FRG REPS TO UNDERTAKE MOVE TO REMOVE ANTI-TERRORIST LAW FROM AGENDA FOR SEPT 9 MEETING OF BERLIN HOUSE OF REPRESENTATIVES.

7. COMMENT: IN TAKING VIEW THAT ARTICLE 3 SHOULD NOT APPLY IN BERLIN, ALLIED REPS HAD IN MIND PROBLEMS CREATED IN IMMEDIATE AFTERMATH OF LORENZ KIDNAPPING

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WHEN FEDERAL PROSECUTOR BUBACK ARRIVED IN BERLIN AND  
ANNOUNCED THAT HE WAS TAKING OVER THE INVESTIGATION.  
SENAT, AT ALLIED PRODDING, HAD TO DISAVOW HIS STATE-  
MENT, AND ALLIES SOUGHT TO EXPLAIN IT AWAY TO SOVIETS

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WHEN THEY PROTESTED. IF ARTICLE 3 OF NEW LAW WERE  
ADOPTED, BUBACK COULD IN SOME FUTURE CASE REPEAT HIS  
LORENZ PERFORMANCE, ONLY THIS TIME WITH FULL BACKING  
OF LAW. THIS TIME, IT WOULD BE MUCH MORE DIFFICULT  
TO EXPLAIN TO SOVIETS.

8. ALLIED REPS ARE MINDFUL OF DANGERS POINTED OUT BY USBER OF DISPUTE WITH GERMANS OVER LEGAL UNITY AND ALSO OF POSSIBILITY THAT DISAGREEMENT OVER TAKEOVER OF PORTION OF NEW LAW COULD HAVE ELECTION CAMPAIGN FALLOUT. WE WILL HOPE TO GET FRG AGREEMENT THAT BY PERMITTING TAKEOVER OF THE SUBSTANTIVE ASPECTS OF THE NEW LAW WE ARE LEAVING ONLY A SMALL GAP IN LEGAL UNITY, AND ONE THAT IS MORE OPTICAL THAN REAL. HOPEFULLY FRG WILL AGREE THAT PRUDENCE REQUIRES THIS STEP, BECAUSE OF GROWING TENDENCY OF SOVIETS TO FOCUS ON ACTIVITIES OF THE PROSECUTOR AND COURTS IN BERLIN.

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9. ALLIES ALSO BELIEVE BK/L CAN STILL BE ISSUED WHICH WILL GIVE BETTER HANDLE IN GENERAL OVER ACTIVITIES OF FEDERAL PROSECUTOR, ALONG LINES SUGGESTED BY USBER. EMBASSIES ANTICIPATE REFERRING REDRAFTING OF BK/O AND BK/L TO BERLIN MISSIONS, ONCE AGREEMENT ON GENERAL COURSE OF ACTION IS REACHED IN BONN GROUP. WE WILL REPORT FURTHER AND SEEK INSTRUCTIONS FOLLOWING BONN GROUP DISCUSSIONS.  
HILLENBRAND

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